

PARTIAL PAYMENTS AND RELATED CONDUCT CAN AFFECT YOUR ABILITY TO EVICT NON-PAYING TENANTS

Partial payments affect evictions. Partial payment scenarios arise in different ways. If a landlord accepts a partial payment during the eviction process, the landlord has generally waived the right to evict based on the Three-Day Demand for Rent or Possession. Some payment related communications by landlords could also waive the right to evict. In consumer matters, the law has developed the least sophisticated consumer standard. Because courts are scrutinizing landlord actions more than ever, this month we discuss payment related conduct that could affect evictions and should be avoided.

Knowing the legal issues and principles that determine landlord-tenant payment issues will help any landlord understand conduct that should be avoided. When a landlord decides to evict a tenant based on nonpayment, the landlord is making an election. As stated in a proper Three-Day Demand for Rent or Possession (“DRP”, “rent demand”, “three-day”, or “three-day notice”), the landlord is demanding that the tenant either pay the rent or vacate the premises. Pay means to pay the demand amount. Vacate means to vacate the premises, and surrender possession back to the landlord. Accordingly, when a landlord serves a three-day, the landlord is declaring the tenant’s right to possession is forfeited if the tenant does not pay within the three days.

Historically, the law has viewed forfeiture as a harsh result. For this reason, the law hates forfeitures and tries to avoid them. Accordingly, if possible, Courts will readily determine that a landlord has waived its right to have the tenant’s possession forfeited. Thus, any act done by a landlord, with knowledge of an existing right of forfeiture, which recognizes the existence of a tenancy, is a waiver of the landlord’s right to enforce the forfeiture.

The legal definition of waiver is to intentionally relinquish (give up) a known right. After a rent demand expires, landlords know that they do not have to accept the tenant’s rent. The landlord has the right to declare the tenant’s right of possession forfeited. The rent demand starts the possible forfeiture of tenant’s possession by giving the tenant three days to pay, or get out (forfeit possession). When a landlord accepts rent after the service of a three-day notice, the landlord is recognizing the tenancy. In other words, the landlord is saying “forget about paying or getting out, I’m negating that three-day by recognizing our relationship”. By accepting any payment, after service of a three-day, the landlord has intentionally relinquished the right to have tenant’s possession forfeited based on tenant’s failure to pay rent and landlord’s subsequent service of a rent demand.

Most landlords understand the general rule that accepting rent after the service of the three-day notice waives the landlords right to evict based on that three-day notice. However, not everyone understands that waiver can arise in many different contexts.

Failure to return partial payments with proper documentation is a frequent scenario. In this scenario, the tenant makes a full or partial payment. Rejection of a full payment can only be

made after the expiration of the three-day because if made prior to expiration, the landlord would legally have to accept the payment. The tenant may make a partial payment either before or after the expiration of the three-day. The landlord doesn't want to accept payment because the payment is not full payment demanded.

If the landlord does not promptly return the payment and properly document the return of the payment, the tenant can successfully argue that the landlord has waived its right to proceed on the existing three-day notice. Holding a payment and not promptly returning it is the same as accepting payment, even if you do not deposit the payment. If you return the payment but do not handle the return of the payment properly, the tenant can argue that you never returned the payment. For example, if you mail the payment, the tenant can argue that you still have it because the tenant never received it. To properly document rejection of a payment, the landlord should always communicate in writing that the payment is not being accepted. The rejection communication should further state that for security reasons (to prevent the payment from being lost or stolen), tenant must come to the office and pick up the payment.

Payment portals can also cause the inadvertent acceptance of partial payments. For many communities, rent is due on the first and late if not paid by the third of the month. Rent demands are served on the fourth and expire on midnight on the seventh. If tenants can pay online, the tenant can pay anytime, even after the expiration of the three-day. If landlord uses an online payment portal, the portal must be programmed to reject certain payments. First, the portal must reject any payments made after the expiration of rent demands. Second, the portal must reject partial payments after three-days are served. If your tenants can pay online, you should verify that your decision about accepting rent is not being undermined by tenants making payments online that you wouldn't otherwise accept.

Statements, bills, and reminders can also create waiver issues by negating your three-day notices. The problem is that many of these written communications go out after rent demands have been served or expired, and thus communicate an inconsistent message. A rent demand says pay or get out. If the community then sends the resident a reminder that states, "this is a reminder that your rent is overdue, please pay immediately", the rent reminder waives the landlord's right to proceed on the current three-day notice. Similarly, if the community sends the tenant's rent statements or bills with amounts due and payment dates, the statements or bills arguably negate a rent demand. In these cases, the landlord has acted (informed the tenant that the landlord will accept money) inconsistent with the right of forfeiture (to have the tenant evicted if the tenant doesn't pay the rent demanded in the three-day). Rent statements or bills can imply or make it clear that the tenant can still pay and landlord will accept the money long after the expiration of the three-day notice.

Even a rent demand can waive landlord's right to evict if the demand is not paid. Specifically, some landlords put additional language on rent demands. If this language can be interpreted to mean that the tenant can pay after the expiration of the three-day, then arguably the three-day notice is not valid. An eviction for rent is based on a valid three-day notice. If you don't have a valid three-day notice, you can't evict.

Recently, a judge implied that the language used on a standard Demand for Rent or Possession could be construed as a waiver. The language at issue states: “Pursuant to your lease if this demand is not paid within three days, an additional amount of \$300, is due for attorneys’ fees and court costs”. Even though this language has been used on three-day notices for nearly twenty years, a judge, for the first time, said that the language implied that if the tenant offered to pay the full amount of the three-day notice, plus the attorneys’ fees and court costs, that landlord would accept the payment. Based on the judge’s comments, we promptly advised our clients to remove this language. Remember, if THS has filed the eviction, and the tenant offers to pay and you are willing to accept the payment, you need to collect attorneys’ fees and court costs. If you don’t, and later try to evict based on a three-day notice for these amounts, a court is likely to rule you waived your right to collect them by accepting the amount on the notice.

***For more information on the three-day notice issue:
THSlawfirm.com/Resource-Information/Legislative-Industry-Alerts***

“What is the language that was REMOVED from the standard three day?”

Based on waiver arguments, THS also recommends against the use of agreements regarding eviction (AREs). Some landlords use AREs so they can accept payments and continue with the eviction. The key language of an ARE states that the landlord may accept payments during the eviction process, but this is not considered a waiver of the landlords right to proceed with the eviction. The goal of an ARE is for the landlord to get paid, but if the tenant does not pay to keep the eviction moving along.

However, courts could easily construe an ARE as a waiver of the landlord’s right to evict. Because legally any act that recognizes a lease constitutes a waiver, judges could find an ARE waives the right to evict, despite ARE language that landlord’s acceptance of money is not a waiver. Absent an ARE, the law is clear that if you accept money, this negates the three-day notice, waives your right to evict on that three-day, and you must serve a new three-day if any money is still owed. An ARE can’t change this result because the eviction statute states that a lease cannot waive a tenant’s right to get a three-day demand for rent prior to being evicted. Arguably, and ARE is nothing more than a lease amendment that alters the payment terms.

Partial payments and waiver issues can arise in multiple contexts. Landlords can directly waive their right to evict on a three-day notice by accepting a partial payment after service of the three-day. Landlords can indirectly waive their right to evict by implying the tenant has the right or ability to pay the rent after expiration of a three-day notice. Because accepting money after service of a three-day notice waives the landlords right to proceed on the rent demand, landlords must make a choice, if a tenant offers a partial payment. Does the landlord want the money? Or does the landlord want possession? If a landlord has received a partial payment, the landlord cannot avoid the decision by holding the money and remaining silent. If you do not promptly return the money, you have chosen to accept it. If a landlord accepts a partial payment, the landlord has not waived its right to evict, but only waived the right to evict based on the previously served rent demand. To evict, the landlord only needs to serve a new three-day for any balance still owing. When developing SOPs, landlords need to consider how a procedure

impacts three-day notices, and whether the procedure implies that payment will be accepted at any time regardless of the service of rent demands.